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Re: Comments on the Proposed Revised Code of Judicial Conduct

Dear Attorney Berenson,

On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the proposed revised Code of Judicial Conduct. The BBA appreciates and recognizes the efforts put forth by the Supreme Judicial Court (SJC) Committee to Study the Code of Judicial Conduct in drafting the revised Code.

The proposed revised code was reviewed and discussed by the BBA's Ethics Committee and its Delivery of Legal Services and Litigation Section Steering Committees which drafted the attached comments. The comments were reviewed by all BBA Sections and the BBA Council, which approved the submission of the comments to the Justices of the SJC. In addition, the BBA provides its institutional comments at the start of the document.

Please note that, unless otherwise noted, the enclosed comments do not constitute or reflect a position of the BBA as a whole, but rather summarize the comments received from the Ethics Committee, Litigation and Delivery of Legal Services Section Steering Committees. We offer these comments with the hope that they may be useful to the SJC as it considers the proposed revised Code.

**Comments from the Boston Bar Association on the Proposed Revisions to the Code of
Judicial Conduct
(5/20/15)**

Comments from the Boston Bar Association

The BBA is pleased to see that Canon 3^e of the proposed revised Code of Judicial Conduct (CJC) addresses many of the issues raised by its June 2014 letter to the Committee on Judicial Ethics (see attachment A). The Association specifically applauds the SJC Committee to Study the Code of Judicial Conduct on Rule 3.7, encouraging judges to participate in such activities and to get involved with legal, educational, religious, charitable, fraternal, or civic organizations, including bar associations. The narrowed definition of “fundraiser” (Rule 3.7 Comment 3) and explicit recognition of the value of judicial participation in activities that “promote public understanding of and confidence in an independent judiciary, foster collegiality among the bar and communication and cooperation between the judiciary and the bar, enhance the judge’s ability to perform judicial or administrative duties, or otherwise further the goals of the courts” (Rule 3.7 Comment 1B) are all positive additions to the revised CJC.

The Association also supports the inclusion of Rule 2.6(A) encouraging judges to make reasonable efforts to assist self-represented litigants. With so many self-represented litigants in the court system, this rule will provide important guidance to judges on how to handle their cases and help assure access to justice. The rule strikes a strong balance of fairness by encouraging affirmative judicial assistance short of giving any party an advantage or the appearance of partiality.

Comments from the Boston Bar Association’s Ethics Committee, Delivery of Legal Services Section Steering Committee, and Litigation Section Steering Committee

The Boston Bar Association’s Ethics Committee and Litigation and Delivery of Legal Services Section Steering Committees also reviewed the Proposed New Code of Judicial Conduct. They offer the following specific comments:

Canon 1 – The Ethics Committee welcomes the higher level of detail contained in the revised code for the useful practical guidance it provides.

Canon 2

Rule 2.3 – The Ethics Committee supports this rule and is pleased to see that the revised CJC contains a definition of “harassment” and extensive examples in Comment 3. The Committee feels that more examples may be helpful, especially concerning contemptuous or disrespectful treatment in addition to those already provided about hostile or harsh treatment. The Committee also suggests that “ancestry” be deleted as unnecessary (it is encompassed by “national origin”);

that “nationality” be replaced by “citizenship or immigration status;” and that “color” and “gender expression” be added as categories.

Rule 2.5 – The Ethics Committee is concerned that this rule replaces the language in current Canon 3B(8) requiring judges to “dispose of all judicial matters promptly, efficiently, and fairly” with weaker language requiring “[competence and diligence].” The Committee believes that a commitment to promptness and efficiency should remain.

Rule 2.6 – The Ethics Committee supports this revised rule. While most judges already make reasonable accommodation to assist self-represented litigants as required in Rule 2.6(A), formalizing this principle and clarifying its bounds are important, especially as the number of self-represented litigants continues to increase. Rule 2.6(B) encouraging settlements is also consistent with the current practices of most judges and its codification should have some salutary effect in deterring coercive judicial action by providing judges with additional guidance.

The Delivery of Legal Services Section Steering Committee unanimously supports this rule, and hopes that it will assist judges in providing access to justice for unrepresented litigants.

Rule 2.9 – The Ethics Committee is pleased to see that the revised CJC preserves the detail in the existing Massachusetts rule, absent in the ABA Model rule, which explains how a judge is to handle information and consultation with others who are associated with the courts in the course of deciding a case. This guidance is extremely valuable. The new comments augment this detail with specific and practical examples that appear to anticipate questions that could arise about this topic.

The Committee also supports the revised rule’s carve-outs for specialty courts and sessions, which are forward-looking and useful to facilitate the special functions of these courts and sessions.

Rule 2.14 – The Ethics Committee supports inclusion of this rule, noting that it will help prevent harm to the justice system, foster public confidence in the administration of justice and assist members of the bar potentially facing substance abuse, mental, or physical impairment issues.

Rule 2.16 – The Ethics Committee supports this new Rule, requiring judicial cooperation with judicial and lawyer disciplinary authorities, and barring retaliation against those who participate in investigations of judges or lawyers.

Rule 3.1 – The Ethics Committee supports the revisions to current Canons 4 and 5 because the revised rule generally encourages judicial engagement and contains more specific language and useful examples of the types of prohibited extrajudicial activities. See discussion of Canon 2.3 above for suggested revisions to the listing of prohibited factors.

Rule 3.2 – The Ethics Committee supports this revision, because it recognizes that judges possess special expertise in matters of the law, the legal system, and the administration of justice and permits them to share this expertise in a constructive way. This rule will assist judges who volunteer for the Bar Association when determining whether they may publicly comment on pending legislation and the Legislature as well, which will benefit from their expertise.

The Litigation Section is concerned that the language in Rule 3.2A is overbroad and unclear, especially when read in conjunction with Comment 1. Specifically, the Litigation Section feels it is more appropriate for a judge to appear before a governmental body or consult with government officials concerning the legal system or administration of justice than generally on “the law.” The Litigation Section reads the examples in Comment 1 to reflect this understanding of Rule 3.2A.

Rule 3.3 – The Ethics Committee approves of the slightly stricter language (“shall not” over “should not”) contained in the revised code, as voluntary character testimony offered by a judge could inappropriately lend the prestige of judicial office to another.

Rule 3.5 – The Ethics Committee recommends changing “health or safety” to “health, welfare or safety.”

Rule 3.6 – The Ethics Committee recommends including color, gender expression, and disease or disability to the list of organizations practicing invidious discrimination that judges are prohibited from participating in.

Rule 3.7 – The Ethics Committee strongly supports the revised Rule 3.7, noting that it creates a viable balance between the clear integrity and common sense of modern judges and the needs of the legal community and others concerned with the effectiveness of the legal system to work for common objectives without creating the fact or appearance of lack of integrity, independence, or impartiality or of other impropriety.

Rule 3.9 – The Ethics Committee supports the new rule because it includes stronger language (replacing “should not” with “shall not”) and provides helpful clarification of the rule’s exceptions.

Rule 3.10 – The Ethics Committee supports the new rule because it includes stronger language (replacing “should not” with “shall not”) and clarifies that a judge may act *pro se* and draft or review documents without compensation for family members. The Committee recommends an additional clarification in 3.10(A) that “a judge shall not ‘ghost write’ pleadings for family members.”

Rules 3.11 and 3.12 – The Ethics Committee is concerned that the revised rule does not expressly address compensation for a judge’s management of investments owned by the judge or the judge’s family and thus it is unclear whether they are permitted to earn this sort of compensation.

Rule 3.13 – The Ethics Committee views this rule as a vast improvement over the existing Canon 4D(5) because of its increased specificity and clarity. However, the Ethics Committee is concerned that Comment 10 appears to create an ill-advised limitation on when a judge may accept free or discounted legal services from a firm where not all the lawyers are relatives or close personal friends of the judge. This broad limitation may make it hard for judges to retain the best counsel they can when they need legal representation in connection with matters of public interest connected with their official positions. It may have also a chilling effect on legal cases addressing core judicial functions of the courts.

The Ethics Committee recommends that this comment distinguish between accepting free or discounted legal representation in connection with a matter of public interest connected to the judge’s official duties/position (in which case the limitation of Comment 10(ii) would not apply), and representation of a judge on personal matters, *e.g.*, a personal real estate transaction (in which case the limitation of Comment 10(ii) should apply).

The Litigation Section agrees with the Ethics Committee’s comment generally and hopes that as part of judges’ expanded ability to accept free or discounted legal services as contemplated by the Ethics Committee, the revised code will also expand the public disclosure requirement. The Litigation Section feels that the public has a right to know if a judge is receiving free or discounted legal services, in any type of matter, from a firm where not all the lawyers are relatives or close personal friends of the judge.

Rule 3.14 – The Ethics Committee supports the broadening of the revised rule which permits reimbursement for incidental expenses. However, it is concerned that the revised rule removes the permission to seek reimbursements for guests. The prohibition on guest reimbursement might discourage a judge from attending certain events where the expenses incurred by a guest, such as a spouse, might be significant and unavoidable given the occasion, such as a destination conference.

These types of limits are not included in the ABA Model Code Rule and may interfere with the stated goal of encouraging judges to get more involved in extrajudicial law-related activities.

Canon 4 – The Ethics Committee recognizes that revised Canon 4 contains most of provisions of current Canon 5 and is content with its language and substance.
